Local 803, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO, and Bobby Mills, an agent for Local 295, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO (Bechtel Constructors Corporation et al.) ***and*** **Oscar A. Bass.** Case 12–CB–3478

December 16, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS OVIATT AND RAUDABAUGH

On May 29, 1992, Administrative Law Judge Lawrence W. Cullen issued the attached decision. The Respondents filed exceptions and a supporting brief. The General Counsel filed a reply brief and cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The issue presented in this case is whether Local 803, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO (Local 803) and Bobby Mills, Local 803's business agent, violated Section 8(b)(1)(A) and (2) of the Act by bypassing the Charging Party and referring two member employees, requested by name by a sister local, for employment outside Local 803's jurisdiction. We disagree with the judge's finding that Local 803's referrals in this instance violated the Act.

Facts

Local 295, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO (Local 295), a sister local of Local 803, had a collective-bargaining agreement with Bechtel Constructors Corporation (Bechtel) and other contractors establishing an exclusive hiring hall. On some occasions, Local 295 was unable to fill contractors' requests for employees through its own out-of-work list and it then contacted other local unions to fill the requests within the contractual 48-hour time limitation.

Local 803 also operated an exclusive hiring hall, but within a different geographic jurisdiction. Local 803 used an out-of-work list for making referrals within its geographical jurisdiction. Members of Local 803 were permitted to seek work in other locals' jurisdictions without obtaining permission or travel cards from Local 803. Members remained on Local 803's out-of-work list when seeking work or when actually working outside Local 803's jurisdiction.

Local 803 makes out-of-jurisdiction referrals when requested by other locals, including Local 295. Local 803 does not receive fees or dues for making out-of-jurisdiction referrals and often does not know to what employer the employee is being referred. Mills testified that out-of-jurisdiction referrals are made to other locals as an accommodation to employees within Local 803's jurisdiction. Mills also testified that, when making out-of-jurisdiction referrals, he does not use Local 803's out-of-work list, but instead relies on his memory.

Local 295 does not allow its retirees to use its referral system and informed other locals, including Local 803, not to refer retirees for jobs within Local 295's jurisdiction, and Mills was aware of Local 295's retiree rule. The retiree rule, however, was not included in the collective-bargaining agreement between Bechtel and Local 295. Retiree Oscar Bass, the Charging Party, was unaware of Local 295's retiree rule.

The circumstances giving rise to this proceeding are as follows. Bass, a member of Local 803, heard that Bechtel was hiring in Local 295's jurisdiction and contacted Mills to inquire about out-of-jurisdiction work at Bechtel. Mills replied that some work was coming up and that if able, he would try to send Bass out. Bass later learned that another member of Local 803 had been sent to Bechtel and Bass again went to see Mills. Mills told Bass that there had been no call for pipefitting, the type of work that Bass performed. The next day, Bass heard that two other Local 803 members, Richard Partridge and Don Watson, who were both below Bass on the out-of-work list, had been referred to Bechtel. Bass again spoke to Mills about the referrals. The judge credited Bass' testimony that Mills told Bass that Partridge was referred because he was a welder and that Watson was referred because of his status as an officer of Local 803 and that Local 803 liked to keep its officers working close to home. The judge, however, found that Mills was not candid with Bass about his reasons for referring Partridge and Watson. Rather, the judge found the real reason that Mills did not refer Bass was because Bass was a retiree.

J. Ronnie Malphurs, Local 295's business manager, testified that he had received a call from Bechtel for four pipefitters. Malphurs had already exhausted Local 295's out-of-work list and thus called other locals for referrals. Malphurs called Local 630 and requested two pipefitters and called Local 803 to request the other two pipefitters. Malphurs testified that when he called Mills at Local 803, he specifically requested Partridge and Watson. Malphurs explained that he sometimes requested employees from other jurisdictions by name

because either he himself had worked with them before, or because a member of his local had worked with them and had recommended the person as a good worker. In this instance, Malphurs testified, he personally knew Partridge and was familiar with his work and that a member of Local 295, whom Malphurs did not identify, had recommended Watson. Mills also testified that when Malphurs called, he requested Partridge and Watson by name.

The General Counsel's Exhibit 12 reflects the original request from Bechtel, the length of the job, the type of job skills required, the names of the locals that Malphurs contacted, and the names of the employees referred by the sister locals. Exhibit 12 also includes a notation made by Malphurs stating ''called by name.''

The judge credited the testimony of Malphurs and Mills that Watson and Partridge were requested by name.

The judge found that Local 295 operated an exclusive hiring hall pursuant to an agreement with Bechtel and that Local 803 and Mills were agents for Local 295 in the operation of its hiring hall.[1] The judge further found that Mills and Local 803 operated Local 295's exclusive hiring hall for referrals from Local 803's own jurisdiction to Local 295's jurisdiction without the benefit of written or published standards but instead using subjective criteria. In addition, the judge found that Local 803 failed to refer Bass for employment in Local 295's jurisdiction because of his retirement status and that this basis for nonreferral constituted a departure from the exclusive hiring hall procedures set out in the agreement between Bechtel and Local 295. The judge also found that Bass was not given notice of the alleged change in Local 295's referral procedures. Accordingly, the judge concluded that Local 803 and Mills violated Section 8(b)(1)(A) and (2) of the Act by arbitrarily refusing and failing to refer Bass for employment within Local 295's jurisdiction. Finally, the judge found that Local 803 and Mills referred Watson because of his status as a union official, thus violating Section 8(b)(1)(A) and (2) of the Act. For the reasons discussed below, we disagree with the judge's findings that the Respondents violated the Act.

A. *The Use of a Mental List*

The judge credited testimony showing that Malphurs called Mills and requested Partridge and Watson by name for referral to the Bechtel jobsite. Although the judge credited this testimony in his summary of the facts, he did not discuss the testimony in his legal analysis. Because the record shows that Malphurs requested Partridge and Watson by name, we reject the judge's finding that Mills arbitrarily failed to refer Bass based on his use of a ''mental list'' or other subjective standards.[2] Instead, we find that, in light of Malphur's request for Partridge and Watson by name, Mills had no choice in which employees would be referred.

The judge relied on *Plumbers Local 513*, supra, in determining that Local 803's failure to refer Bass constituted a violation of the Act. *Local 513*, however, is distinguishable from the present case. The referring local in *Local 513* provided 8 to 10 employees to the originating local pursuant to the originating local's general request for employees. The referring local's business agent called employees within the local whom he knew were out of work and were willing to travel; he did not use the local's out-of-work list or any other objective standard for determining which employees to call. In contrast, in this case, Malphurs did not simply ask for two employees to be referred, but instead specifically asked that Partridge and Watson be referred. Thus, Mills and Local 803 had no discretion in determining which employees would be referred to Local 295 and they did not have a need to apply any criteria, objective or subjective.

Moreover, we note that the referral relationship between the locals in *Local 513* was more formal than the relationship in the instant case. For example, the employees who were referred out in *Local 513* reported to the originating (requesting) local's office rather than to the employer and the employees were required to obtain travel cards from their own local before seeking work at other locals. Further, the locals appeared to be required to honor the referral requests of each other. Thus, the business agent in *Local 513* testified that if a sister local called for a referral, ''you'd better fill it.'' In contrast, in this case, the referrals reported directly to the employer and the em-

[1] The record does not indicate whether a charge was filed against Local 295. In any event, a complaint was not issued against Local 295 and it is not a respondent in this proceeding.

[2] Although the judge found an agency relationship between Local 803 and Local 295, and thus found that an exclusive hiring hall existed, the judge did not make a broader finding regarding Local 803's agency status with respect to each local to which it refers employees. We do not make any finding on the issue of whether the Respondents' general use of subjective standards to make out-of-jurisdiction referrals violates the Act. In order to find such a violation, the General Counsel would have to show that, in all instances of out-of-jurisdiction referrals, an agency relationship exists between Local 803 and the participating locals sufficient to establish an exclusive hiring hall, that the referrals are made through that exclusive hiring hall, and that Local 803 has not relied on objective standards. See *Plumbers Local 513*, 264 NLRB 415 (1982), enfd. 720 F.2d 215 (D.C. Cir. 1983). The General Counsel has not established the existence of these factors with respect to Mills' use of a ''mental list'' or other subject standards in making out-of-jurisdiction referrals in general. To the contrary, the only issue presented by the facts in this case is whether the Respondents' referral of two employees for out-of-jurisdiction work, when the employees were requested by name by the originating local, violated the Act. We find that it does not because the Respondents did not rely on subjective standards.

ployees did not need permission or travel cards before seeking work in another local's jurisdiction. And of even greater significance, Mills testified that he viewed referrals made to other locals merely as an accommodation provided to members and employees within Local 803's jurisdiction.

The facts of this case more closely approximate those in *Plumbers Local 162 (Natkin & Co.)*,[3] in which the referrals made by the respondent union, of employees requested by name by another local, for employment outside the respondent union's geographical jurisdiction, were found not to violate the Act because the respondent union followed its established procedure of referring journeymen requested by name, without regard to their position on the out-of-work list. The decision in *Local 162* distinguished *Local 513* because the respondent union in *Local 513* failed to follow its established procedures for referring employees after receiving a request for unnamed employees.

As indicated above, this case can be distinguished from *Local 513* on the same grounds. Thus, Malphurs specifically requested Partridge and Watson, and Local 803 simply complied with Local 295's request for referrals by name; and the General Counsel has not shown that Local 803 failed to follow its established procedure for filling another local's request for employees by name. Thus, as in *Local 162*, we find that Local 803 and Mills' referral of Partridge and Watson did not violate Section 8(b)(1)(A) and (2).[4]

B. *The Retiree Rule*

The judge also concluded that Mills did not refer Bass to Local 295 because of his status as a retiree and that Mills was not candid with Bass when explaining the reason for his failure to be referred. The judge then proceeded to analyze Local 295's retiree rule as a departure from its exclusive hiring hall procedures. The judge found that the restriction on retirees was not contained in the agreement between Bechtel and Local 295 and that when Local 295, and Local 803 as agent for Local 295, failed to refer Bass because of his retirement status, this constituted a departure from the hiring hall procedures set out in the agreement. Finally, the judge concluded that Bass was not given any notice of the change in the hiring hall procedures.

We have already found that the Respondents had no choice but to refer Partridge and Watson because Malphurs had specifically requested their referral. Hence, we reject the judge's finding that Bass was not referred because of his retiree status. Moreover, for the reasons indicated below, we reject the judge's other findings regarding Local 295's retiree rule and the Respondents' implication in its alleged enforcement.

Neither Bass' charge nor the General Counsel's complaint contained any mention of Local 295's retiree rule and therefore Local 803 and Mills had no notice that the rule was an issue in the case. Further, the General Counsel failed to assert at the hearing, or in its brief to the judge, that the retiree rule constituted a departure from Local 295's hiring hall rules and thus constituted a separate basis for finding an unfair labor practice. Finally, we emphasize that Local 295 is not a respondent in this case, and thus the legitimacy of its retiree rule and its application are not before us. We conclude, therefore, that the retiree rule issue was not fully and fairly litigated, and we thus decline to adopt the judge's finding of a separate violation of Section 8(b)(1)(A) and (2) based on such rule. See *Advo System*, 297 NLRB 926 (1990).

C. *Pattern Makers Violation*

Finally, the judge relied on *Pattern Makers League*[5] and found that Local 803 violated Section 8(b)(1)(A) and (2) of the Act by referring Watson because of his status as a union official. We disagree. Local 803 referred Watson because Local 295 requested him by name and, although Watson is an officer of Local 803, there is no evidence or suggestion that Local 295 knew that Watson was an officer. We note again that Local 295 is not a respondent in this case. Local 803 merely honored Local 295's request that Watson be sent to the Bechtel jobsite. For these reasons, we decline to find that Local 803 violated the Act when it referred Watson to Local 295.[6]

ORDER

The complaint is dismissed.

[3] 283 NLRB 1160 (1987).

[4] The judge in *Local 162* specifically found that the respondent union made the referrals in question in good faith and without an unlawful motive. In this case, we note that Mills was not candid with Bass about his reasons for making the referrals; however, because Partridge and Watson were requested by name, we find Mills' disingenuousness insufficient to show that the Respondents had an unlawful motive in referring Partridge and Watson.

[5] 233 NLRB 430 (1977), enfd. in part 622 F.2d 267 (6th Cir. 1980).

[6] We do not make any findings about whether Mills' statement to Bass that ''Local 803 tries to keep its officers working locally if an all possible'' is, by itself, sufficient to constitute a violation of the Act because the judge did not make such a finding in his conclusions of law and the General Counsel did not file an exception requesting such a finding.

Michael B. Frost, Esq., for the General Counsel.
Richard B. Siwica, Esq. (Egan, Lev & Siwica, P.A.), of Orlando, Florida, for the Respondent.

DECISION

STATEMENT OF THE CASE

LAWRENCE W. CULLEN, Administrative Law Judge. This case was heard before me on December 2, 1991, at Orlando, Florida, and is based on a complaint filed on August 15,

1991, by the Regional Director for Region 12 of the National Labor Relations Board (the Board). The complaint is based on a second amended charge filed by Oscar A. Bass, an individual, on July 17, 1991, and alleges that Local 803, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO (the Respondent or Local 803) and Bobby Mills, an agent for Local 295, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the U.S. and Canada, AFL–CIO (Local 295) violated Section 8(b)(1)(A) and (2) of the National Labor Relations Act (the Act) by since on or about April 25, 1991, acting as an agent for Local 295, referring employees for employment with Bechtel Constructors Corporation (Bechtel) and various other employers who are parties to collective-bargaining agreements with Local 295 within its geographical jurisdiction, by arbitrarily and without reference to any published objective criteria, and by arbitrarily failing and refusing to refer the Charging Party, Oscar A. Bass, an individual, for employment and by discriminatorily failing and refusing to refer Bass for employment because he was not an officer of the Respondent. The complaint is joined by the answer of Respondent, Local 803, wherein it admits the employment status of Bechtel and the various other employers and that Local 295 has collective-bargaining agreements with Bechtel and the various other employers but denies that Local 295 operates an exclusive hiring hall and denies the commission of any violations of the Act.

On the foregoing complaint and answer as amended at the hearing and the stipulations entered into at the hearing and the evidence submitted at the hearing including the testimony of the witnesses and after due consideration of the briefs submitted by the parties I make the following[1]

FINDINGS OF FACT

I. JURISDICTION

The Business of the Employers

The complaint alleges and Respondent admitted at the hearing and I find that at all times material, Bechtel Constructors Corporation (Bechtel), a Nevada corporation with an office and place of business in Palm Beach Gardens, Florida, and construction jobsites at the Kennedy Space Center, Patrick Air Force Base, and Cape Canaveral Air Force Station, located in Cape Canaveral, Florida (the Cape Complex), has been engaged as a general contractor in the building and construction industry performing the rebuilding of launch pads and related services, that during the 12 months preceding the filing of the complaint, Bechtel has, in the course and conduct of its above-described business operations, provided services valued in excess of $50,000 for other enterprises within the State of Florida, including Martin Marietta Corporation, which is directly engaged in interstate commerce, and that Bechtel is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint further alleges and Respondent admitted at the hearing and I find that at all times material, UE&C-Catalytic (Catalytic), a Delaware corporation with an office and place of business in Titusville, Florida, and construction jobsites at Cape Canaveral, Florida, has been engaged as a mechanical subcontractor in the building and construction industry performing installation, fabrication, erection, and related services, that during the 12-month period preceding the filing of the complaint, Catalytic has, in the course and conduct of its above-described business operations, purchased and received at its Cape Complex products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Florida and that Catalytic is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The complaint further alleges, Respondent admitted at the hearing, and I find that at all times material, Sauer Incorporated, d/b/a Sauer Southeast (Sauer), a Pennsylvania corporation with an office and place of business in Jacksonville, Florida, and construction jobsites at Cape Canaveral, Florida, has been engaged as a mechanical subcontractor in the building and construction industry performing installation, fabrication, erection, and related services, that during the 12-month period preceding the filing of the complaint, Sauer has, in the course and conduct of its above-described business operations, purchased and received at its Cape complex products, goods, and materials valued in excess of $50,000 directly from points located outside the State of Florida, and that Sauer is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

It is also alleged in the complaint, Respondents admit, and I find that Local 803 and Local 295 are labor organizations within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Facts*

Local 295's geographical jurisdiction covers Flager, Volusia, and Brevard counties in the State of Florida, whereas Respondent Local 803's jurisdiction covers Orange, Seminole, Lake, and Osecola counties in Florida. As stated above Local 295 has a current collective-bargaining agreement with Bechtel which provides in pertinent part that ''The Union [Local 295] is recognized as a primary source of qualified employment referrals. Other sources may be used if the Union is unable to fulfill the Employer's [Bechtel's] requirements within 48 hours.'' In accordance with the foregoing contractual provision Local 295 refers employees to the Bechtel jobsite at Cape Kennedy Space Center which is a source of a number of jobs performed by various employers in the jurisdiction of Local 295 with which Local 295 has collective-bargaining agreements. On a number of occasions Local 295 is unable to fill the requirements for referrals of employees through its own out-of-work list and it then contacts other local unions to fill the requests of the employers within the contractual 48-hour-time limitation according to the unrebutted testimony of Local 295 Business Manager-Financial Secretary/Treasurer J. Ronnie Malphurs (Malphurs). Respondent Local 803 operates a hiring hall and its business agent Mills utilizes an out-of-work list which is periodically updated for referring employees to employers within Local

[1] The following includes a composite of the credited testimony of the witnesses.

803's jurisdiction. Employees notify Local 803 when they are out of work and their name is placed on the out-of-work list and their names move up on the list as employees above them on the list are referred out. Retired members (including Bass) are permitted to utilize the out-of-work list and obtain referrals for employment within Local 803's jurisdiction. Employees on the list are permitted to refuse three job referrals without losing their place on the list. Short term jobs (lasting less than 15 workdays) do not count as a referral for purposes of losing one's position on the list.

Local 803's out-of-work list for February 1, 1991, showed that Bass' last day of work was July 6, 1988. Bass testified he had last been on a long-term job in 1988. Respondent Local 803 updated its out-of-work list on July 26, 1991, and changed Bass' last date of employment shown on the list to April 23, 1990. Business Agent Mills testified this change was made to show that Bass had worked on a single job for longer than 15 days in 1990. Bass testified that although he worked for the same employer in excess of 15 days in 1990, he worked at different jobs and on each occasion he cleared it with Local 803 and thus he did not work on a single job in excess of 15-workdays so as to be counted as having had a job referral for purposes of the out-of-work list. Mills testified that the revision and listing of the job in 1990 as a long term job for Bass occurred sometime between February and July 1991. The General Counsel notes in his brief that the original charge was filed on May 29, 1991, prior to the updated list of July 1991.

With respect to out-of-jurisdiction referrals made by Local 803, Mills testified he does not utilize the out-of-work list but instead relies on his ''memory'' or a ''mental list'' for making referrals of employees to out-of-jurisdiction jobs. Mills testified he is unaware of the terms of the contractual agreements of other local unions with employers and has no authority and exercises none with respect to the referrals of employees within other jurisdictions. Local 803 receives no fee or dues for making referrals to other jurisdictions and often has no knowledge of the particular employer to which the employee is to be referred. Mills also testified that members of Local 803 are permitted to solicit work on their own in other unions' jurisdictions without obtaining permission from Local 803 or any restrictions whatsoever, and that referrals are made to other jurisdictions when requested by other unions such as Local 295 as an accommodation to Local 803 members and employees within its jurisdiction. He also testified that as a result of the large number of other locals who sometimes request that they refer employees to them and many restrictions and limitations which are placed by Local 803 members and employees within the Local 803 jurisdiction as to whether and where they are willing to travel for work, it would be an administrative nightmare for him to maintain a separate out-of-work list or to utilize the regular Local 803 jurisdiction out-of-work list for making out-of-jurisdiction referrals.

Malphurs testified that he has told Mills and business agents at other local unions not to send him retirees as Local 295 does not permit its own retirees to utilize its referral system and consequently does not permit other local unions to refer retirees to jobs within Local 295's jurisdiction. Mills testified he was aware of this practice. Malphurs' and Mills' testimonies were unrebutted in this regard and I credit it.

Bass testified that in April 1991 he heard that Bechtel was hiring (in the jurisdiction of Local 295) and that he and another employee, Richard Partridge, went to see Mills and inquired about this. Mills told them some work was coming up and he would send them out if he were able to do so. Bass is a retiree and receives a pension from the Union. Mills did not inform Bass that Malphurs had told him not to send his retirees for referral. Subsequently Bass learned that Partridge had been hired by Bechtel and that more hiring by Bechtel was anticipated. Bass again went to see Mills who told him there had not been any calls for pipefitters which is the classification of work Bass performs. The day following this conversation with Mills, Bass learned that two other members of Local 803, Steve Partridge and Don Watson, had been referred to Bechtel. Bass testified that he questioned Mills about these referrals and that Mills told him that Partridge had been referred as a welder and that Watson had been referred because of his status as an officer of Local 803 (a member of the executive board) and that Local 803 liked to keep its officers working close to home. Mills testified in acknowledging this conversation that Watson was an officer in the local, and Local 803 tries to keep its officers working locally if at all possible but he also testified that the reason for referring out Watson was that he received a call from Local 295 requesting Watson. Bass testified that Steve Partridge and Watson had been on the same jobs with him in 1988 and 1990 respectively and that each of them had remained on the job after Bass left the job which would place them below Bass on the out-of-work list. Bass further testified it was his understanding that the out-of-work list was used for out-of-jurisdiction referrals as well as for referrals within Local 803's jurisdiction. There was no evidence presented to show that Local 803 had informed Bass or other employees using its referral system to the contrary.

Malphurs testified that he requested Steve Partridge and Watson by name on his own initiative on April 18 when he called Mills. He explained at the hearing that as a result of his time spent in the trade as a workman he has come to know other employees in other local union jurisdictions of the trade and that often his own members recommend employees from other jurisdictions. There is no contention that Bechtel (the employer in this case) called for any of the employees by name. Malphurs testified further that he told Mills that the job would be 4 to 6 months' long and he needed four pipefitters. This testimony is borne out by the ''Employers request for employees'' form used by Malphurs which shows that the job was for 4 to 6 months to do rigging. Bass is an experienced pipefitter and does rigging as acknowledged by Mills at the hearing. Malphurs testified at the hearing that he does not work his own retirees and does not refer out retirees from other jurisdictions in Local 295's jurisdictions and that he has told other union locals not to send him retirees and that he found out after the fact that Bass (a retiree) had been sent to him for a referral by Local 803 and was referred out in Local 295's jurisdiction in 1988 without his (Malphurs') knowledge of this and when he learned of this, he complained to Mills and told him not to send him any retirees in the future as he would work his (Malphurs') own retirees first if he were to work retirees.

Issues

1. Whether Local 295 operated an exclusive hiring hall system.

2. Whether Respondent Local 803 was an agent for Local 295 for the purposes of referring employees to jobs within Local 295's jurisdiction.

3. Whether Mills and Respondent make out-of-jurisdiction referrals in an arbitrary manner.

4. Whether Respondent discriminatorily failed and refused to refer Bass for employment to the Bechtel job because he is not a union officer or for other arbitrary reasons.

B. *Contentions of the Parties*

The General Counsel contends as follows:

1. ''It is clear from Bechtel's collective-bargaining agreement that Local 295 is an exclusive source for employees, at least for the first 48 hours Bechtel is not permitted to use any other source for employees until the passage of that 48-hour period. Such agreements have been found to establish an exclusive hiring arrangement.'' *Teamsters Local 328 (Blount-Bros.)*, 274 NLRB 1053 (1956). ''When Mills makes out-of-jurisdiction referrals on behalf of Local 295 in order that Local 295 might meet its obligations under its contract with Bechtel, Mills acts as an agent for Local 295,'' *Plumbers Local 513*, 264 NLRB 415 (1982) enfd. 720 F.2d 215 (D.C. Cir. 1983).

2. ''The Board has held that while an exclusive hiring hall may be operated without a written procedure, it must be operated on the basis of objective criteria,'' *Stage Employees IATSE Local 646 (Parker Playhouse)*, 270 NLRB 1425 (1984). Here Mills readily admitted that there is no procedure for referring employees for out-of-jurisdiction work. He further admitted that such referrals are based on his memory or mental list; about as subjective a method as can be used. Respondent appears to be arguing that if it has no procedures, written or oral, it can refer employees as arbitrarily as it wishes. The Board held in *Iron Workers Local 505, (Snelson-Anvil)*, 275 NLRB 1113 (1985), enfd. 794 F.2d 1474 (9th Cir. 1986).

> However the Board does require that referrals, whether made pursuant to written or unwritten rules, be based on objective criteria and applied in a non-discriminatory manner. *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50 (1982).

3. Respondent Local 803's reliance on the alleged specific request by Local 295 of the individuals referred instead of Bass is misplaced as Bechtel did not request Watson or Steve Partridge but rather Malphurs requested them as he knew them which is a subjective method of selection of employees for referral. Respondent Local 803's apparent contention is that ''while unions cannot use subjective methods for referrals within their jurisdictions, they can use any subjective method when obtaining and referring employees across jurisdictional lines. This flies in the face of Board law requiring objective criteria in the selection of employees for employment,'' citing *Iron Workers Local 505* and *Stage Employees Local 646*, supra. Moreover, there are serious questions ''as to whether Bass was not selected because Local 295 refused to take retirees and specifically called for two individuals.'' Mills concedes that he told Bass that Watson was referred because of his status as a union official. When Mills told Bass (as set out in Bass' unrebutted testimony) ''that the job was short term [used to denote a job of less than 15 days] and that Steve Partridge was sent as a welder, Mills was not telling the truth.'' ''Malphurs testified he told Mills that the job was for 4 to 6 months and needed pipefitters.'' If Mills ''was aware of Local 295's position concerning retirees prior to April, why did Mills not tell Bass . . . that Mills could not send Bass because he was a retiree?'' ''Additionally, when Bass confronted Mills about Watson and Steve Partridge's referrals, Mills did not tell Bass that Local 295 had requested these employees. Rather, ''the policy regarding retirees and the specific requests for Watson and Steve Partridge are afterthoughts, raise questions as to their authenticity, and should not be credited[.]'' ''Thus from the credible testimony it is clear that Bass was refused a referral for arbitrary and capricious reasons and in violation of the Act.''

4. Although Respondent Local 803 asserted ''an unconvincing explanation for why Watson was selected for referral, the credible evidence is that Watson's selection was based upon Watson's official position with Respondent'' which constitutes a violation of Section 8(b)(1)(A) and (2) of the Act, citing *Pattern Markers (Michigan Pattern Mfg.)*, 233 NLRB 430 (1977), enfd. in part 622 F.2d 267 (6th Cir. 1980). The Board stated in *Pattern Makers*, ''This practice unlawfully encourages union membership by conferring special benefits on certain members because of their status in the Union.'' Accordingly, Watson was given preference over Bass because of his position on the Respondent's executive board. Respondent's assertion that Watson was requested by name by Local 295 is an afterthought and is not credible.

The Respondent contends as follows:

1. ''Local 295 did not operate an exclusive hiring hall system, and Section 8(b)(1)(A) is therefore inapplicable.'' ''The linchpin of the theory suggested by *Plumbers Local 513*, is that the alleged principal [here Local 295] has exclusive hiring hall arrangements with its contractors.'' However the Board's recent decision in *Development Consultants*, 300 NLRB 479 (1990), supports Respondent's position that Local 295 did not operate an exclusive hiring hall system. In *Development Consultants*, supra, the Board considered a hiring hall arrangement which provided that the union ''*shall be given the first opportunity* to refer qualified applicants for employment.'' The Board concluded:

> We do not find that the above language necessarily establishes that the Union operates an exclusive hiring hall. Rather we find that the language is also subject to the interpretations that the Union urges—that is, that the provision requires only that the local union having territorial jurisdiction of the jobsite has the first opportunity to refer applicants when the contractor decides to use the hiring hall.

In the instant case ''the hiring hall is not exclusive because Local 295 is merely given the 'first opportunity' to supply manpower.'' Malphurs ''testified that his contract required only that he obtain men from the Local 295 list. Once that list is exhausted, Local 295 had no obligation, contractual or otherwise, to seek manpower from other sources (such as Local 803).'' ''Inasmuch as there was no obligation—contractual or otherwise—to do so, it cannot be contended that

such non-Local 295 job 'referrals' were pursuant to an exclusive hiring hall agreement.''

2. Assuming arguendo there was an exclusive hiring hall agreement, Local 803 did not operate as Local 295's agent. The instant case is distinguishable from *Plumbers Local 513*, supra, as the panel in that case ''stressed certain facts in concluding that an agency relationship existed between Locals 154 and 70 (the principals) and Local 513 (the agent). These critical facts, however, do not exist in the present case.'' In *Plumbers Local 513*, the Board emphasized that a member of Local 513 could not go into the geographical area of Local 70 and have his name placed on the out-of-work list unless he transferred his membership to Local 70. However, in the instant case individuals from other locals need not present travel cards to work through Local 295 and Malphurs testified ''it was 'not unusual' for him to call persons directly if he had work available, and his list was exhausted.'' In Local 513, Plumbers the panel also stressed the ''referred'' workers reported directly to the alleged principals' halls and ''not to the prospective employers'' whereas in the instant case ''the 'referred' employees reported directly to the jobsite.'' In *Plumbers Local 513*, ''it was deemed critical that the principals (Locals 154 and 70) contacted other Locals to obtain men 'to fulfill their contractual obligations''' whereas in the instant case Malphurs testified, ''His labor agreements did not require him to contact other locals for men once he exhausted his list.'' In *Plumbers Local 513*, the ''panel emphasized that the alleged agent 'recognized his obligation to provide employees' to the principal (i.e., Locals 154 and 70).'' ''In the instant case Mills testified there are no requirements, written or otherwise, with respect to these 'referrals.''' ''The *Local 513 Plumbers* case also stressed that 'employment could not be obtained in any other manner.''' In the instant case, ''individuals on the Local 803 list were free to contact Local 295 directly about work.'' ''Finally, the *Plumbers Local 513*, panel found it relevant that working in another jurisdiction required 'authorization, in the form of a travel card, from the home local.''' In the instant case neither Local 803 nor 295 require travel cards.

In addition to those stressed in the *Plumbers Local 513* case there are other considerations that make the instant case distinguishable. ''In out of jurisdiction 'referrals' Local 803: (1) does not do anything but 'suggest' potential workers; (2) does not maintain copies of Local 295's referral procedures (3) does not maintain copies of the other union's labor agreements (4) does not enforce apprenticeship ratios, or otherwise enforce Local 295's agreements; (5) does not fill out any paperwork with regard to 'referrals' to Local 295; (6) in many cases does not even know the identity of the employer; and (7) receives no fees for providing manpower. In these circumstances an agency relationship plainly does not exist between Local 803 and 295.''

3. Assuming arguendo that there was an exclusive hiring hall agreement and that Local 803 was an agent, there was no violation since Bass was a retiree and thus ineligible to work through Local 295's hiring hall, and/or the employees referred to Bechtel were called by name. Malphurs' testimony was unequivocal that he did not refer out retirees through his hiring hall and he communicated this policy to Mills who was aware of it. Under these circumstances the alleged refusal to refer Bass to Local 295 ''was entirely consistent with Local 295's hiring hall rules.'' ''More importantly, the job call in question—where Messrs Donald Watson and Stephen Partridge were 'referred' on April 18, 1991—was a special request; as indicated on Local 295's 'Employer's Request for Employees' form, Malphurs 'called Bobby Mills and requested them (Watson and Partridge) by name.'' ''This was done, as Malphurs explained, pursuant to Local 295's practice of allowing special requests.'' Respondent cites *Laborers Local 1334 (Western Sign)*, 281 NLRB 185 (1986).

Analysis

I find under the circumstances of this case that Local 295 did operate an exclusive hiring hall system, and Section 8(b)(1)(A) is accordingly applicable insofar as that system was operated in an arbitrary and discriminatory manner. It is undisputed that Local 295 has the exclusive right to refer employees for hire for 48 hours to Bechtel and other employers with which it has contractual agreements within its jurisdiction. The sole restriction on this right is that employers have the right to call for employees by name which is a common restriction in hiring hall agreements. I reject Respondent's contention that the limitation of this right to refer to a 48-hour period supports a finding that Local 295 does not operate an exclusive hiring hall. Rather the placement of the 48-hour restriction on Local 295's right to refer employees to the aforesaid employers ensures that if Local 295 is unable to supply the necessary manpower, then the Employer is free to look elsewhere to fulfill his manpower requirements.

I further find that Local 803 and Business Agent Mills have undertaken to serve as an agent for Local 295 in its (Local 295's) referral of employees to work within Local 295's jurisdiction. While there is no obligation on the part of Local 803 to refer employees to Local 295's jurisdiction when Local 295 is unable to meet the employers' requirements for employees, when Local 803 undertakes to do so it becomes an agent for Local 295. In this regard I find *Plumbers Local 513*, supra, cited by the General Counsel is controlling under present Board law and supports a finding that Mills and Local 803 are agents of Local 295, I find the instant case is distinguishable from *Development Consultants*, supra, cited by the Respondent. In *Development Consultants*, the Board relied on language in the Union's collective-bargaining agreements with various employers that ''The local union having jurisdiction shall be recognized as the *principal source* of laborers and shall be given the *first opportunity* to refer qualified applicants for employment. . . . The Employer reserves the *right to transfer or rehire laborers* . . . .'' (Emphasis added.) The Board stated,

> We do not find that the above language necessarily establishes that the Union operates an exclusive hiring hall. Rather, we find that the language is also subject to the interpretation that the Union urges—that is, the provision requires only that the local union having territorial jurisdiction of the jobsite has the first opportunity to refer applicants when the contractor decides to use the hiring hall. As we find that the contractual language does not *require* contractors to use the hiring hall exclusively, we next consider whether the parties practice nonetheless established an exclusive referral system. In light of the testimony of several contractors that they

> have hired laborers without using the hiring hall and without objection from the Union, we do not find that an exclusive referral system existed by practice. Consequently, we find the General Counsel has not met his burden in establishing by a preponderance of the evidence that the Union operated an exclusive hiring hall system. In light of our finding that the Union's discriminatory refusals to refer members . . . violated Section 8(b)(1)(A) but not Section 8(b)(2). . . . Moreover, absent an exclusive hiring hall arrangement, we find no 8(b)(1)(A) violation for the Union's failure to operate its hiring hall in accordance with objective criteria.'' [300 NLRB at 479–480. Emphasis added.]

Based on the foregoing I find that the General Counsel has demonstrated by the preponderance of the evidence that Local 295 operates an exclusive hiring hall as the contractual language clearly supports this conclusion. Moreover assuming the language in the instant case were ambiguous, the Respondent presented no evidence that employers signatory to collective-bargaining agreements were free to hire employees directly without resort to Local 295's hiring hall during the first 48 hours, or that they did so in practice.

Mills' use of ''mental lists'' or his memory without resort to any semblance of a fair and orderly method of referring out employees for employment within the jurisdiction of Local 295 is arbitrary and capricious and violative of Section 8(b)(1)(A) of the Act. *Plumbers Local 513*, supra.

I have examined the testimony of all witnesses at the hearing. I am convinced that Malphurs was telling the truth when he testified that he does not refer out retirees within his own jurisdiction and told Mills not to send him any more retirees after learning after the fact that Bass had been referred by Mills to Local 295's jurisdiction for a job in 1988 although Bass was a retiree at the time. I also credit Bass that Mills told him that the call had been for welders and that Watson was referred because of his status as a union officer. This was at a time when Malphurs testified he had called for four pipefitters with rigging experience which Bass testified he has and which Mills conceded Bass has. I thus conclude that Mills was complying with Malphurs demand that no retirees be sent to jobs within the jurisdiction of Local 295 but that Mills was not candid with Bass that the reason for failing to refer him to jobs in Local 295's jurisdiction was because of his status as a retiree.

The Board has recognized that a union may distinguish in order of preference of referral among different classifications of employees as long as distinctions are not capricious, invidious, or discriminatory. Thus in *Electrical Workers IBEW Local 211 (Atlantic Division NECA)*, 280 NLRB 85 (1986), the Board recognized, without disapproval, clauses in a series of collective-bargaining agreements between the Respondent Union and various employers wherein there were four separate classifications of employees listed for referral in preferential order based on their work experience. However, the Board found ''a union cannot justify referrals that are contrary to its established procedures simply by demonstrating that the conduct lacked a specific discriminatory motivation.'' In *Operating Engineers Local 406 (Ford, Bacon & Davis Construction)*, 262 NLRB 50, 51 (1982), the Board stated,

> any departure from exclusive hiring hall procedures that results in a denial of employment to an applicant falls within that class of discrimination which inherently encourages union membership, breaches the duty of fair representation owed to all hiring hall users and violates Section 8(b)(1)(A) and (2) unless the union demonstrates that its interference with employment was pursuant to a valid union-security clause or was necessary to the effective performance of its representative function. Respondent has made no such showing. In the absence of any legitimate justification, we conclude that the change to a 6-day rule violated Section 8(b)(1)(A) and (2).

The Board further stated in this case that

> failure to give timely notice of a significant change in referral procedures was arbitrary and in breach of its duty to represent job applicants fairly by keeping them informed about matters critical to their employment status.

See also *Cell-Crete Corp*., 288 NLRB 262 (1988).

In the instant case the contractual agreement between Local 295 and Bechtel contains no prohibition or the referral of retirees for employment. Thus when Mills and Local 803 as agents for Local 295 refused and failed to refer Bass for employment because of his retirement status this constituted a departure from exclusive hiring hall procedures set out in the agreement and resulted in a denial of employment to Bass. There has been no showing that the interference with Bass' employment was pursuant to a valid union-security clause or was necessary to the effective performance of the representative function of Local 295. Furthermore no notice was given to Bass that he was not eligible for referrals to Local 295's jurisdiction as he had been referred in 1988. I thus conclude that the failure to refer Bass was violative of Section 8(b)(1)(A) and (2) of the Act. I further find in agreement with the General Counsel and in reliance on *Pattern Makers*, 233 NLRB 430, cited by the General Counsel that the preferential referral of employee Watson because of his status as a union official was violative of Section 8(b)(1) and (2) of the Act.

CONCLUSIONS OF LAW

1. Respondent Local 803 is a labor organization within the meaning of Section 2(5) of the Act.

2. Bechtel Constructors Corporation, Catalytic, and Sauer are employers within the meaning of Section 2(2), (6), and (7) of the Act.

3. Local 295 is a labor organization within the meaning of Section 2(5) of the Act and operates an exclusive hiring hall within the meaning of Section 8(b)(1)(A) of the Act and Local 803 and Bobby Mills have at all times material been agents for Local 295 in the operation of its exclusive hiring hall.

4. By its operation of the exclusive hiring hall of Local 295 for referrals from its own jurisdiction to the jurisdiction of Local 295 without benefit of written or published standards and pursuant to the totally subjective discretion of Business Agent Bobby Mills, Respondent Local 803 violated Section 8(b)(1)(A) of the Act.

5. Respondent violated Section 8(b)(1)(A) and (2) of the Act by its arbitrary refusal and/or failure to refer Oscar A. Bass for employment within the jurisdiction of Local 295.

6. By its preferential referral of Donald Watson because of his status as a union official Respondent violated Section 8(b)(1)(A) and (2) of the Act.

7. The aforesaid unfair labor practices in conjunction with the Employers' status as an employer engaging in interstate commerce affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Respondent Local 803 has violated the Act, it will be recommended that it cease and desist therefrom and take certain affirmative actions to remedy the violation found herein including the posting of an appropriate notice and to mail at its expense a copy of the notice to its members and to all persons who have used its referral system since April 18, 1990. Respondent Local 803 shall be ordered to establish and maintain objective criteria and standards for the out-of-jurisdiction referral of employees from its hiring hall when it acts as agent for other local unions in doing so. It is further recommended that Respondent keep and retain adequate records of its out-of-jurisdiction referrals operations for a 2-year period to disclose fully the basis on which out-of-jurisdiction referrals are made and make those records available to Region 12, on request. Respondent shall be ordered to make Oscar A. Bass and any employee who was discriminated against as the result of the preferential referral of employee Donald Watson because of his status as a union official, whole for any loss of pay and benefits sustained by them by reason of its unlawful discrimination against them. All backpay due under the terms of this Order shall be computed in the manner described in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest to be computed in the manner prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

[Recommended Order omitted from publication.]